

QUESTIONS CONCERNING INDEPENDENCE OF CONSTITUTIONAL COURT AS BODY OF STATE AUTHORITY

The constitutional independence of judges

1. Concerning execution of Constitutional Court decisions

Concerning execution of decisions of the Constitutional Court first of all it must be noted that Law of the Republic of Azerbaijan «On Constitutional Court» does not provide for any legal regulations concerning execution of decisions of the Court.

At the same time, the Constitutional Court has the practice according to which, recognizing by its decisions the disputed legal norm as contradicting to Constitution and laws, the Court recommends to legislative and executive powers of the Republic to bring the disputed norm to conformity with the legal position of Constitutional Court. Thus, there are about thirty relevant recommendations of Constitutional Court to Milli Mejlis (Parliament) and Cabinet of Ministers of the Republic.

Though, Law «On Constitutional Court» does not determine the order and terms for execution of recommendations of Constitutional Court, the majority of recommendations specified in the Court's decisions are executed by the relevant state authorities.

Also it should be mentioned that the Constitutional Court draws up the relevant legal positions for resolution of legal disputes, arising in connection with execution of the Court's decisions (Decision of January 25, 2005).

However taking into account that there is the necessity for legal regulation of execution of the Court's decisions, the Constitutional Court has drafted some proposals on amendments into the Law «On Constitutional Court» for improvement of execution of Constitutional Court decisions.

2. Relations between mass-media and constitutional courts

We consider that the maintenance of openness and publicity of activity of the Constitutional Court is one of the primary goals of such courts since transparency and publicity of activity of constitutional courts increase the trust to judicial system in general and simultaneously facilitates access of citizens to judicial remedies.

It is worth to mention that both Society and Justice are interested in transparency of constitutional legal proceedings. The public estimation, certainly, affects to improvement of quality of work of court. Besides, as it is known, in executive and legislative spheres there is aspiration to change mutual balance between three state authorities, temptation to intervene and influence, in particular, to the prejudice of judicial authority and finally to judicial independence. Thereof, close relations of

constitutional courts with mass media in case of transparency and publicity promotes elimination of these negative issues. The Constitutional Court of the Republic of Azerbaijan makes certain steps towards this issue. Thus, decisions of Constitutional Court as well as all information on activity of Constitutional Court can be found at the web-site of Constitutional Court (www.constcourt.gov.az). Besides, different articles and reports of judges and employees of Constitutional Court on legal issues are occasionally published in the legal press. The Constitutional Court issues its Bulletin where all decisions of Constitutional Court as well as other information concerning the activity of the Court are published.

3. Professional data promoting the implementation of protection of judges of Constitutional Court

The Constitution of the Republic of Azerbaijan provides the whole complex of a guarantee of independence of the judicial authority, creating necessary condition for substantial increase of the status of judicial authority. Together with it the Constitution of the Republic of Azerbaijan allows to allocate peculiar features of independence of judges of the Constitutional Court. The outer side of independence of judges of the Constitutional Court is fixed in following positions: 1) they are not representatives of interests of any state or social structures that prohibits to them to occupy the state or public posts and belong to political parties (article 11.2 of the Law «On Constitutional Court»); 2) the judge has no obligations to those who nominated or appointed him/her to the post of judge (article 5.1 of the Law «On Constitutional Court»); 3) nobody has the right to interfere in activity of judges, give them any instructions on issues studied or considered by the Constitutional Court (article 5.1 of the Law «On Constitutional Court»); 4) conditions in which decisions of Constitutional Court are adopted, provide freedom of judges' will and exclude influence on them.

Along with it, it should be mentioned that special nature of judicial powers of judges of the Constitutional Court, and also necessity of protection of judges from all kinds of pressure assume that judges should behave so that to avoid the conflict of interests or abusing the powers. In connection with the aforesaid, it appears that it is necessary to pay attention to a matter of judicial ethics, being one of basic elements of independence of judges of the Constitutional Court in particular and judges of the general jurisdiction as a whole. It would be desirable to note that independence of the judge is not the subjective personal privilege, and first of all, the obligation. It should generate thus consciousness of each judge that it could in all cases and under any conditions accurately and unequivocally rejects attempts of rendering of external influence. Besides its personal, internal independence which is equivalent to professional advantage of the judge should be one of obligatory qualities of the judge.

There is also another one important issue concerning the status of judges of Constitutional Court. According to the current legislation of the Republic of Azerbaijan,

the Constitutional Court is not included into the general judicial system, and thus the «Code of ethical behavior of judges» adopted by Judicial and Legal Council of the Republic of Azerbaijan on June 22, 2007 does not extend on judges of the Constitutional Court. However the Law «On Constitutional Court» contains separate provisions on judicial ethics of judges of the Constitutional Court. In this connection, there is a question, whether adoption of the separate act regulating issues of professional etiquette of judges of Constitutional Court is expedient or not?

4. Can the age-related criteria necessary for work as a judge stimulate the independence of judges?

One of requirements to the candidate for the judge of the Constitutional Court is the requirement of its spotless reputation. The problem consists that, on the one hand, it is almost difficult to formulate criteria of this spotless reputation, with another - it is necessary to show to the candidate on so high and responsible state post of the similar requirement. It is necessary to rely on standard in the civilized, democratic society of concept of reputation, honor and dignity of the person and the citizen. As to recognized high qualification in the field of the right it is reached by years of professional work and makes sure or diplomas of the candidate or the doctor of jurisprudence, or the honorary titles which assignment too demands presence of the solid professional experience.

It is represented that at definition of the age qualification for the candidate for the judge of the Constitutional Court, it is necessary to pay attention to presence large life and professional experience for stay on so responsible post. Same the requirement of presence of the experience of work by a legal trade speaks.

In conformity with article 126.1 of the Constitution of the Republic of Azerbaijan Judges should be citizens of the Republic of Azerbaijan not younger than 30, having voting right, higher juridical education and at least 5-year working experience in the sphere of law. Proceeding from given article of the Constitution for judges of the Constitutional Court in article 11.1 of the Law «On Constitutional Court» the above-stated requirements are established.

5. Can the financial guarantees, in particular, sufficient salary correspond to the significance of a post and protect judge of constitutional court from possible temptations?

For effective work of the judge material guarantees of independence of the judge of the Constitutional Court, connected with payment of its work, granting of annual holiday, social security, maintenance with habitation, social service, obligatory state life insurance and health of the judge, and his family should be provided.

Courts of the Republic of Azerbaijan possess uniform legal status that is having the equal rights, guarantees and perform uniform duties. In the set elements of the given status are formulated so that to provide independent, steady position of judges. A special

order of appointment to the post of the judge and its discharge from a post provided in articles 95, 109, 128 of the Constitution as is directed on maintenance of their independence. In addition the provisions of articles 126, 127, 128 of the Constitution fix political and legal guarantees of independence of judges. Besides, article 15.2 of the Law «On Constitutional Court» as one of elements of maintenance of independence of judges of the Constitutional Court provides an establishment material and social guarantees, corresponding to the high status of judges.

Proceeding from the specified positions, articles 71-73 of the Law «On Constitutional Court» the material guarantees of independence of judges of the Constitutional Court are fixed.

6. Terms of office of judges of Constitutional Court as guarantee of their independence

The irremovability from office of judges is considered as one of guarantees of independence of judges from executive and legislature. The irremovability does not mean lifelong realization of powers of the judge though in many countries this guarantee is perceived so. In the international norms concerning to independence of judges, practice of lifelong appointment is not obligatory. There is enough, if the certain guaranteed term of appointment is established, during which the judge cannot be dismissed or discharged unreasonably of a post at will of the authorities. According to article 14 of the Law «On Constitutional Court» judges of the Constitutional Court are appointed for a period of 15 years.

7. Criteria and restrictions at dismissal of judge of constitutional court

Principles of the organization and judicial authority activity are the base, original «supporting frame» of third power. They can be defined as fixed in the Constitution and laws the leading base of the general character forming uniform system, having with an overall aim to provide effective realization of functions of judicial authority. One of the most important organizational principles of judicial authority is independence of judges and their submission only to the Constitution and laws.

One of political guarantees of independence of judges of the Constitutional Court is the order of discharge from a post of judges of the Constitutional Court. According to article 95.1.10 and article 130.2 of the Constitution of the Republic of Azerbaijan judges of the Constitutional Court are appointed by the Milli Mejlis (Parliament) of the Republic of Azerbaijan with recommendation of the President of the Republic of Azerbaijan. On the basis of article 95.2 of the Constitution the decision on appointment of judges of the Constitutional Court are accepted with majority of votes of 63 members of the Milli Mejlis.

The general guarantees of independence of judges of the Constitutional Court are fixed in parts I-III of article 128 of the Constitution of the Republic of Azerbaijan, and also in article 16 Law «On Constitutional Court». We will notice that in parts IV and V of article 128 of the Constitution are defined the bases and an order of deprivation of powers of judges of the Constitutional Court. Thus, whenever judges commit crime, the President of the Republic of Azerbaijan, based on conclusions of Supreme Court of the Republic of Azerbaijan, may make statement in Milli Mejlis of the Republic of Azerbaijan with the initiative to dismiss judges from their posts. Respective conclusions of Supreme Court of the Republic of Azerbaijan must be presented to the President of the Republic of Azerbaijan within 30 days after his request.

Decision on dismissal of judges of Constitutional Court of the Republic of Azerbaijan is taken by Milli Mejlis of the Republic of Azerbaijan with majority of 83 votes.

Along with it, in article 15.2 Law «On Constitutional Court» it is established that independence of judges of Constitutional Court is provided for by unchangeable term office and immunity, specific procedure for appointment, bringing to criminal responsibility, premature termination of authorities and dismissal from the office, inadmissibility to contempt of the Court and interference with its activity. Judges have granted with financial and social security according to their high status.

Also an additional guarantee of independence of judges of the Constitutional Court is the rule established in article 16.10 of the Law «On Constitutional Court» which says that «No legal proceedings can be instituted against Judge of Constitutional Court for his/her activity, votes, opinions expressed at Constitutional Court as well as no testimonies or explanations can be claimed from him/her in this matter». The similar requirement is established in article 24 of the Law «On Constitutional Court».

Courts' methods of work

1,4,5. The competitiveness principle is fixed in article 28 of the Law «On Constitutional Court». The law on the Constitutional Court proceeds, in essence, from the general concept of competitiveness, characteristic for all kinds of legal proceedings. However, we will notice that competitive beginnings in the constitutional legal proceedings have the own features. One of such feature is that by inquiries and references about interpretation of the Constitution and laws there is no dispute between the parties, and the subject having the right to the reference in the Constitutional Court is not resisted by the remedial contender.

Concerning a principle of oral we will notice that this principle in forms of the constitutional justice can have smaller significance than in courts of law. Therefore as strict observance of oral is predetermined by necessity to provide to judges and participants of process direct perception of information on the facts received from primary sources that promotes objective acknowledgement of circumstances of case.

The constitutional legal proceedings are inherently directed not on an establishment of the facts; it is constructed on the analysis of exclusively normative material, on substantial comparison of normative texts. Therefore these objective bases cause in some cases necessity and an admissibility of written process for the constitutional legal proceedings. So, in article 27.2 of the Law «On Constitutional Court» it is established that proceedings at Constitutional Court conduct, as a rule, oral. In case of consent by parties and interested subjects, the Plenum of Constitutional Court can hold written proceedings via procedure provided for by Internal Charter of Constitutional Court.

Together with it, we consider that the legal nature of a principle of competitiveness, on a level with other legal principles promotes legal proceedings not only strengthening of independence of judges, but also provides full and objective disposal of legal proceeding.

Concerning a question on preservation of confidentiality of a name of the judge of the lecturer for the purpose of its protection against external pressure, we will notice that according to a principle of collective leadership in the Constitutional Court all affairs, are considered jointly. It is thought that a principle of collective leadership really providing the purposes of the constitutional legal proceedings, promotes removal of the decisions as much as possible protected from external pressure.

3. Legal positions of the Constitutional Court are formed taking into account bases of the Constitution, its supremacy and direct force, the international acts which party is the Republic of Azerbaijan, including a principle of a priority of human rights and freedom.

Besides, the Constitutional Court develops practice according to which its legal positions formulated in decisions, should be obligatory for all state structures, local governments, officials in all similar legal situations. It means that legal force of legal positions possesses the general character and is equated to legal force of decisions of Constitutional Court, and thereof are subject to application not only in concrete case, but also in all similar cases. One of requirements of the constitutional legality consists in it.

In this connection a question it would be desirable to notice that activity of the Constitutional Court, in quality of "the negative legislator» allows to assert that the Constitutional Court finally appears involved in legislative process. It is necessary to consider, the Constitutional Court, possessing negative legislative powers, and cancelling laws and other statutory acts or their separate positions owing to their discrepancy of the Constitution, to a certain extent possesses positive legislative powers, forms a positive constitutional law, promoting perfection and development of the branch (current) legislation.

With reference to the Constitutional Court of the Republic of Azerbaijan it is expressed, first of all, in a giving of recommendations to the legislator or other authorized body to carry out necessary is normative-legal regulation according to legal positions of the Constitutional Court.

So, during the activity the Constitutional Court in more than 20 decisions has made corresponding recommendations of Milli Mejlis and to the Cabinet of Ministers of the Republic of Azerbaijan. It is necessary to understand that in these cases legal positions of the Constitutional Court act as material criteria of legal regulation, set to its known parameters, are original models of the future legal norms.

Besides, in the decision of July 21, 2010 the Constitutional Court, having made Milli Mejlis the corresponding recommendation concerning reduction of some norms of the criminal-procedure legislation according to its legal positions, has specified that before entering specified change and additions the given decision of the Constitutional Court should be applied.

However it should be noted that judicial rule-making, carried out by the Constitutional Court, does not carry absolute character, it is limited by the constitutional principle of separation of powers. Being, first of all, the keeper of the law in force, the Constitutional Court should provide its stability and constancy, but, applying the law, the Court continues to be partly a creator of the new law, forming a basis in formation of a modern democratic lawful state.

Along with it should be desirable to mention a question on the legal nature of decisions of the Constitutional Court connected with interpretation of the Constitution.

As it is known, the interpretation proceeding from the Constitutional Court, is undoubtedly, obligatory for all bodies, officials and citizens, acts of such interpretation have, in essence, normative character. Feature of such decisions of the Constitutional Court is that the Constitution already cannot be applied in a separation from the decisions of the Constitutional Court concerning corresponding norms of the Constitution, and the more so contrary to these decisions.

Is it possible to assert in that case, what validity of such decisions of the Constitutional Court exceeds validity of the law (except the constitutional laws), and is somewhat almost equal to validity of the Constitution?

4. In legislation of the Republic of Azerbaijan, unfortunately, there is no legal norm determining order and terms of elimination by authorized bodies of any legislative contradictions revealed by the Constitutional Court.

At the same time, the Constitutional Court has the practice according to which, recognizing by its decisions the disputed legal norm as contradicting to Constitution and laws, the Court recommends to legislative and executive powers of the Republic to bring the disputed norm to conformity with the legal position of Constitutional Court. Thus, there are about thirty relevant recommendations of Constitutional Court to Milli Mejlis (Parliament) and Cabinet of Ministers of the Republic.

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However taking into account that there is the necessity for legal regulation of execution of the Court's decisions, the Constitutional Court has drafted some proposals on amendments into the Law «On Constitutional Court» for improvement of execution of Constitutional Court decisions.

In conclusion it should be noted that the absence at the Constitutional Court of the legal leverage on the legislator as regards the prompt execution of decisions of Constitutional Court negatively influences not only on independence of judges, but also on authority of the Court as the body of constitutional justice.